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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 387

PAN AMERICAN PETROLEUM CORPORATION, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER PAN AMERICAN PETROLEUM CORPORATION

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September, 1963

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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In this case and companion case No. 386, the Commission's arguments conclusively show that the Petition in the instant case should be granted:

1. All parties in this case and in No. 386 emphasize two important, inseparable questions under the Natural Gas Act: (a) the question of reviewability of a

substantive "general" order upon the record in a rule-making proceeding, raised in this case; and (b) the question of substantive validity of a specific "general" order, raised in No. 386. The Commission cannot dispute the general importance of underlying issues as to applicability of this Court's decisions respecting direct review of "general" orders, as to necessity for expeditious judicial review, and as to desirability for review upon the record in the proceeding in which an order is issued. The Commission, however, does attempt to minimize the intertwining of these questions with the question raised by the Commission in No. 386. In so doing, the Commission rests upon three erroneous claims: (a) that the instant case "is one of a number of consolidated cases in the Court below"; (b) that the question is "whether the Court of Appeals correctly dismissed the instant case as premature"; and (c) that the instant case "has obviously receded in importance." None of these claims is correct.

2. Contrary to the Commission's implication, the instant case and the *Texaco* and *Pan American* cases before this Court in No. 386 were not fully consolidated below. Each case was considered on its separate record, as reflected by the several certified records deposited in this Court by petitioners in Nos. 386 and 387. As a result, unless the Petition in No. 387 is granted, this Court will not have before it the three principal records actually considered by the Tenth Circuit in review of arguments of parties now involved in No. 386. Consideration of all three records is of continued importance, and the posture of the three records is now also relevant to any issues as to a stated conflict and as to questions not properly considered by the Ninth Circuit in *Superior Oil Co.* v. *Federal*

Power Commission, No. 18,252, August 26, 1963 (petition for rehearing *en banc* filed on or about September 23, 1963).[1] Under these circumstances, granting of the Petition in No. 387 will bring to the Court the underlying record in the basic rule-making proceeding for consideration of the question of direct reviewability, and, in conjunction with No. 386, of the posture of all questions as reached by the Tenth Circuit.

3. Contrary to the Commission's assertion, the court below did not hold that Order No. 242 was not "ripe" for direct review in the instant case or that that order should not be reviewed in a direct appeal upon the rule-making record. Instead, the court below held that the Commission's interpretation of Section 19(b) of the Act "preclude[s] any such expeditious review." The court stated its difficulty (317 F. 2d at 802-803):

> "An easy and quick method of reviewing orders which affect substantive rights and which are of general applicability would aid the administration of the Act. The difficulty is that the Commission has construed § 19(b) so as to preclude any such

[1] In addition to questions raised by the expressed holdings of the Ninth Circuit in *Superior*, underlying the decision of that court are at least two questions affecting validity of its judgment. The first involves absence of jurisdiction in that court to consider validity of Order No. 242 *per se* when the record upon which Order No. 242 was based had been and still is certified to the Tenth Circuit under provisions of Section 19(b) of the Natural Gas Act which provide for vesting of "exclusive jurisdiction" for review of a Commission order in the court to which such a record has been certified. A second such question is correctness of the Ninth Circuit's proceeding to a question of "reasonableness" of a Commission rule in the absence of the record and the findings upon which the Commission relied to support claimed "reasonableness" of such rule. *Cf. Burlington Truck Lines, Inc., et al.* v. *United States, et al.*, 371 U.S. 156 (1962); *United States* v. *Carlo Bianchi and Company*, 371 U.S. 939 (1963).

expeditious review and the position of the Commission has been quite uniformly upheld by the courts.

> "In seeking reviews of orders of general applicability the petitioners rely on the decisions in Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, 62 S. Ct. 1194, 86 L. Ed. 1563, and United States v. Storer Broadcasting Co., 351 U.S. 192, 76 S. Ct. 763, 100 L. Ed. 1081, in which rules of general applicability affecting substantial rights were held reviewable under other statutes. The courts of appeals have not applied these decisions in determining rights to review under § 19(b). * * *."

Thus, "prematurity" was not the basis for the court's holding; to the contrary, the court adopted the Commission's erroneous views that "form of proceeding" controls reviewability.

4. Contrary to the Commission's claim, the basic question of direct reviewability of a substantive "general" order raised in this case has not "receded" and cannot "recede" in importance. The problem of inter-circuit conflicts inherent in the Commission's approach to direct review of substantive regulations is illustrated by the stated conflict in these cases with the decision by the Ninth Circuit in the *Superior* case. Any discussion of questions actually reached by the Tenth Circuit in No. 386, and any consideration of questions not properly reached by the Ninth Circuit in the *Superior* case, cannot avoid recognition of the intertwined nature of the issue of direct reviewability and the issue of substantive validity in No. 386. In addition, it is impossible to rationalize the Commission's claim that the direct review issue has "receded" in importance with the Commission's contentions in No.

386 that the order in question is of sweeping substantive effect, and that the Commission has unlimited powers under the Act to proceed with substantive decisions through the vehicles of "rule-making" proceedings and issuance of "general" orders.[2] In the face of these contentions, the question of direct reviewability of such substantive "general" orders is of an importance equal to that of substantive validity of the particular rule in question in No. 386. Certainly, the Tenth Circuit's difficulty with what that court described as the Commission's "bootstrap operation" underscores this importance of the reviewability issue. In addition, difficulties for litigants and the courts flowing from the Commission's position on reviewability have now been further revealed by questions as to issues not properly considered by the Ninth Circuit in the *Superior* case.[1] The broad issue of reviewability of substantive "general" orders therefore cannot disappear by a separate decision in No. 386 on validity of this particular rule, but will remain a question of controversy and confusion in the administration of this statute unless resolved in these cases.

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[2] The Commission's brief in opposition in No. 387 does not address itself to the Commission's obviously ambivalent position in No. 386, the Commission relies almost exclusively upon *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956), to support its position on construction of the Natural Gas Act, but on the question of direct reviewability, the Commission has contended that the Communications Act and the Natural Gas Act are so dissimilar that tests of reviewability set forth in *Storer* cannot be applied under the Natural Gas Act. The fact is that the issue of reviewability ripe in No. 387 and the issue of substantive validity ripe in No. 386 are inseparable not only because of the nature of the proceeding below, but also because of this confusing, inconsistent treatment of *Storer* by the Commission.

5. Pan American agrees with the Commission that the issue of substantive validity of the particular rule in question is ripe for consideration by the Court in No. 386.[3] Beyond this, the arguments of all parties in Nos. 386 and 387 also lead to the conclusion that the Petition in No. 387 should be granted. Granting of the Petition in No. 387 will bring before this Court the principal cases and parties in the posture existing before the Tenth Circuit, the separate records in the principal cases decided together by that court, and the two major issues now ripe for review and of continuing importance and applicability in the administration of this regulatory statute. Rather than "complicating" consideration by this Court, granting of the Petition in No. 387 will provide the most logical, effective means for considering and deciding two inseparable, equally important questions affecting rule-making under the Natural Gas Act.

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[3] Pan American, of course, does not agree with the Commission's reading of cases relied upon by the Commission in its brief in opposition in No. 387, such as *Sun Oil Co.* v. *Federal Power Commission*, 304 F. 2d 293 (5th Cir. 1962), and cases cited in footnote 4 on page 8 of the Commission's brief. As indicated in the cases in which opinions were written, the courts obviously had first accepted the Commission's argument that the orders in question were "procedural" and that any substantive effect could be considered fully if and when such orders actually operated to deprive a company of specific rights. By contrast here, the Commission's pleadings in No. 386 in this Court fully reveal the true, immediate substantive effect, impact and nature of Order No. 242 and reveal that there is no basis for the Commission's argument that such a truly substantive order is not directly reviewable.

CONCLUSION

For the foregoing reasons and those set forth in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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